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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 600

JAMES HOSIE,

Petitioner,

vs.

CHICAGO & NORTH WESTERN RAILWAY COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Scheffer Press, Inc.—ANdover 3-6850

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No.

JAMES HOSIE,

Petitioner,

vs.

CHICAGO & NORTH WESTERN RAILWAY COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, The Chief Justice and Associate Justices of The Supreme Court of the United States:

The petitioner, James Hosie, prays that a writ of certiorari issue to review the decision and judgment order of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW.

The order of the United States District Court, for the Northern District of Illinois, Eastern Division, entering

judgment in favor of the respondent, Chicago & North Western Railway Company, a corporation, entered on November 13, 1959 is not reported.

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the District Court was filed September 28, 1960, and is not yet reported, but is set forth as Appendix "A" *infra*. The final order of affirming the judgment of the District Court is set out as Appendix "B".

JURISDICTION.

This petition is filed within ninety days of the entry of the final order of the United States Court of Appeals for the Seventh Circuit affirming the District Court.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED.

The only questions here presented are:

1. Whether Rule 21 of the United States District Court is unconstitutional and in degradation of the Seventh Amendment to the Constitution of the United States?
2. Whether the submission of the cause on the questions of liability only deprived the plaintiff of a fair and impartial trial?

STATUTES AND RULES INVOLVED.

Constitution of the United States. Amendment (VII)

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law. (Amendment VII, U.S. Constitution)

RULES INVOLVED.

Rule 42(b) of the Rules of Federal Procedure

(b) Separate Trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues. (Title 28 R 42-b.)

Rule No. 21 of the District Court

Separation of Issues in Civil Suits. Pursuant to and in furtherance of Rule 42(b), Federal Rules of Civil Procedure, to curtail undue delay in the administration of justice in personal injury and other civil litigation wherein the issue of liability may be adjudicated as a prerequisite to the determination of any and all other issues, in jury and non-jury cases, a separate trial may be had upon such issue of liability, upon motion of any of the parties or at the Court's direction, in any claim, cross-claim, counterclaim or third-party claim.

STATEMENT OF THE CASE.

The plaintiff, James Hosie, brought this action against the defendant, Chicago & North Western Railway Company, to recover damages for personal injuries sustained when he was struck by defendant's train on December 21, 1956, at the intersection of the railroad tracks with Hale Street and Chicago Avenue in the Village of Palatine, Cook County, Illinois.

On November 9, 1959, the day before trial, the trial court on its own motion severed the issue of damages from the issue of liability under Rule 21 of the Civil Rules of the District Court, to which ruling both the plaintiff and the defendant objected (A. 10). At the close of plaintiff's case, the defendant moved the court for directed verdict which was denied and the defendant rested.

The case was thereupon submitted to the jury on the issue of liability only. The jury returned a verdict finding the defendant, "not guilty". Judgment was entered on the verdict (A. 16, 17). The plaintiff filed a Motion for a New Trial which was denied and an Appeal to the Court of Appeals followed (A. 17, 20). On appeal the judgment of the District Court was affirmed.

The plaintiff, James Hosie was 43 years of age and at the time of the occurrence he was employed by Edward Hines Lumber Company in its Palatine Branch as a yard foreman. He had been so employed upward of ten years (A. 23). His duties were to see that box cars which came into the yard were properly loaded and unloaded; that the men delivered the right amount of lumber and to keep the

yard in "*tip top*" shape. The work of unloading the cars was done by stevedores, furnished by the All Work Employment Agency, of Chicago (A. 39). When stevedores were required, the Employment Agency was notified of the need a day in advance. The number of men requested would be sent out on the first train out of Chicago which was due to arrive at the Palatine Station at 7:35 in the morning (A. 39). At about 4:00 P.M. on December 21, 1956, the plaintiff notified the "Employment Agency" that he would need two or four men for the following day. He expected them to arrive at the Palatine Station on the 7:35 train from Chicago.

On the day of the accident, the plaintiff reported for work at the office of the Hines Company at approximately 7:20 A.M. He checked into the company's office to see if there were any order to go out. There were none and he proceeded to the railroad spur to check the cars that were on the siding to be sure that they were cars consigned to the Hines Company. This siding is shown in plaintiff's Exhibit No. 2. He found out that they were the cars consigned to Hines. He then started to walk up towards the front of the Hines shed which is located just east of Hale Street and south of the tracks (A. 42).

It was his custom to meet the stevedores sent out by the Agency, at the railroad crossing on Hale Avenue. He left the shed or office of the Hines Company at about 7:40 assuming that the train which was due to arrive at the Palatine Station at 7:35 had already passed (A. 41). He walked to the pedestrian walk on the east side of Hale Avenue. He was standing at a point approximately a foot south of the south rail of the west bound tracks at the extreme east line of Hale Street of the pedestrian walk. This point is marked with an "X" in plaintiff's Exhibit No. 8. He first looked to the southeast along the right-of-way. It was

slightly foggy, but there was visibility to the southeast for three or four blocks. No train was in his range of vision. He then looked northwest towards the Station to see if the stevedores were at the station. He did not see the stevedores nor did he see any train at the Station at that time.

At this time he was facing northwest looking towards the Station. The railroad gates were up. He stood in this position looking towards the Station for approximately a minute and one-half. While he was so standing he saw a train coming into the Station from the northwest headed toward Chicago (A. 43). As this train came into the Station the gates for Hale Street went down for this train, and at the same time the crossing bells started to ring (A. 44).

The train remained stopped at the Station approximately a half a minute to a minute and then proceeded south on the north tracks. As the southbound train crossed the intersection he noticed the engineer or fireman seated on the right side of the locomotive. He nodded to the plaintiff and the plaintiff waved back to him (A. 44). The plaintiff did not hear any train horn, whistle or bell of any kind at the time, although he was in a position to hear such a whistle, horn or bell from any train in close proximity if a whistle or horn had blown or a bell rung (A. 44, 45). Just as the southbound train passed him he felt an impact and that is all he remembers (A. 45). He neither saw nor heard the northwest bound train prior to the impact.

At about 7:50 A.M. Jerry Krizek, a fellow employee of the plaintiff at Hines Lumber Company was notified by a pedestrian that one of Hines' employees had been hurt at the crossing (A. 30). Krizek did not hear any horn or

whistle or bell from any train just prior to the occurrence. He ran from the Hines' premises to the intersection of Hale and Chicago Avenue where he saw the plaintiff lying flat on his back on Chicago Avenue about 6 feet away from the south curb and some 85 feet northwest of the point of impact. He also noticed plaintiff's wrist watch lying in the street about 6 feet away from the plaintiff's unconscious body (A. 32). The wrist watch was introduced in evidence as Plaintiff's Exhibit No. 10 and showed that the watch had been broken in the occurrence. The hands showed 7:47 (A. 30, 33).

The train came to a stop with the middle of the last coach of a 6 coach train (A. 26), 171½ feet north of where plaintiff was lying and eighty-five feet west of the point of impact.

REASONS FOR GRANTING THE WRIT.

I.

Rule 21 of the District Court deprived the plaintiff of a jury trial in violation of the Seventh Amendment of the Constitution of the United States.

On the day before actual trial the trial court on its own motion and over the objection of counsel for both the plaintiff and the defendant ordered that the case proceed to trial solely on the issue of liability. This order purports to be authorized under Rule 21 of the Rules of the District Court which provides:

> "Separation Of Issues In Civil Suits
>
> Pursuant to and in furtherance of Rule 42(b), Federal Rules of Civil Procedure, to curtail undue delay in the administration of justice in personal injury and other civil litigation wherein the issue of liability may be adjudicated as a prerequisite to the determination of any or all other issues, in jury and non-jury cases, a separate trial may be had upon such issue of liability, upon motion of any of the parties or at the Court's direction, in any claim, cross-claim, counterclaim or third-party claim."

This rule as applied in the case at bar denied, abridged and modified plaintiff's right to a jury trial as guaranteed by the Seventh Amendment of the Constitution of the United States and changed the long, ancient, and established manner of trials in civil cases at common law. The Seventh Amendment of the Constitution of the United States provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a

> jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Title 28, U.S.C.A., Section 207 provides that the rules shall preserve the right of trial by jury *in common law* and as declared by the Seventh Amendment of the Constitution.

A separation of issues was unknown at Common Law. At the time the Seventh Amendment was adopted, trial by jury, contemplated a complete trial by a single jury and not a "piece-meal trial" upon only one issue of the case. The rule as applied in this case prevented the plaintiff from introducing evidence as to his injuries and is a direct violation of the accepted Common Law principles of trying a case in its entirety in one continuous session. The severance of issues was totally unknown at Common Law, as witnesses once called were required "to give evidence on all matters of fact within their knowledge concerning issues of the particular litigation". (Pound, *Readings on the History and System of the Common Law*, 125-126); Millar, *Civil Procedure of the Trial Court in Historical Perspective*, 272 (1952)). There is nothing in the Common Law which permits two or more verdicts in any single case. On the contrary only a single verdict was known at Common Law. (*McKeon* v. *Central Stamping Company*, 264 Fed. 385 (3rd Cir.).

The case of *Miller* v. *American Bonding Co.*, 257 U.S. 304, 42 S. Ct. 98, is precisely in point. In that case the Supreme Court at Page 308 of the opinion said:

> "In actions at law the general practice is to try all the issues in a case at one time; and it is only in exceptional instances where there are special and persuasive reasons for departing from this practice that

distinct causes of action asserted in the same case may be made the subject of separate trials. Whether this may be done rests in the court's discretion." (Emphasis ours)

To the same effect is the case of *Hodges* v. *Easton*, 106 U.S. 408, where Mr. Justice Harlan at pages 412-413 of the opinion said:

"• • • It has been often said by this court that the trial by jury is a fundamental guaranty of the rights and liberties of the people. Consequently, every reasonable presumption should be indulged against its waiver • • •.

One other point discussed by counsel for defendants in error must be noticed. He insisted that the order of reversal, if one be made, should be accompanied by a direction to the court below to restrict the next trial to such issues as are not covered by the answers of the jury to special questions. In support of this position, we have been referred to several adjudications which seem to recognize the authority of the court, when setting aside a judgment, to restrict the subsequent trial to such issues as were not passed upon by the jury at the first trial. Whether this contention be sound or not, we need not now determine, for the reason that the grounds upon which it rests have no existence, where, as here, the case, as to the issues triable by jury, was not submitted to the jury in the mode required by law. There is, then, no alternative but to reverse the judgment, with directions that a trial be had upon all the material issues of fact • • •."

Similarly in the case of *Patton* v. *United States*, 281 U.S. 276, 288, the Supreme Court, in defining a trial by jury, said:

"• • • 'trial by jury'. That it means a trial by jury as understood and applied at common law and includes all the essential elements as they were recog-

nized in this country and England when the Constitution was adopted, is not open to question. These elements were—(1) *that the jury should consist of twelve men, neither more nor less;* (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and (3) that the verdict should be unanimous." (Emphasis ours)

Failure to submit all of the issues at the same time violates both our common law concept of the right of a trial by jury and is unconstitutional as it violates the Seventh Amendment of the Constitution.

II.

The trial court under the facts in the case at bar committed prejudicial and reversible error in directing a separate trial on the aspect of liability only.

In the case at bar the plaintiff sustained severe and permanent injuries (A. 8). He was unconscious for a long period of time after the diesel engine struck him. The plaintiff himself was the only witness testifying to the facts of the occurrence. The procedure adopted in separating the issues prevented the plaintiff from introducing evidence of his injuries which necessarily was related to both the proximate cause and the negligence of the Railroad Company. These issues could not be properly separated because the nature of the trauma had a substantial bearing upon many of the factual questions necessary to be decided in the determination of "liability". The nature of the injury and the extent of trauma may well indicate *how the accident occurred.* To deprive the plaintiff of the right to show what part of his body was injured and the nature and extent of these injuries deprived him of the only type of jury trial known in common law. If the issue of liability can be separated from the issue of dam-

ages a case may be submitted solely upon the question of defendant's negligence or on the question of contributory negligence of the plaintiff, or on the issue of "proximate cause". This type of procedure is not only unconstitutional but it violated plaintiff's common law rights to a trial by jury and prohibited a coherent presentation of plaintiff's case. Separation of issues is condemned.

In the case of *United States ex rel. Rodriquez* v. *Weekly Publications, Inc., et al.*, 9 F.R.D. 179, in discussing the feasibility of the separation of issues the Court said:

> "In the instant case, the segregation of the issues of liability and damages and their trial to two separate juries would mean that the first jury would be confronted with the question of fraud in the abstract without the necessary connection to specific damage and the second jury would be confronted with the issue of damages without having before it the links which unite them to the fraud."

To the same effect is the case of *McClain* v. *Socony-Vacuum Oil Co.*, 10 F.R.D. 261.

The Court of Appeals cites several cases to support the contention raised by the defendant-appellee in that court to which they contend hold that the right of jury was preserved in the instant case. None of the cases cited is applicable to the situation involved. On common law there was no such thing as two verdicts in a single cause and the procedure of separating the issues was unknown. It is well established law that the judicial opinion must be read as applicable only to the facts involved and as authority for what was actually decided.

Argument has been presented to the fact that Rule 42B of the Rules of Federal Procedure, Title 28, Rule 42B justifies the procedure here complained of. A review of cases upon which Federal Courts have authorized a

separation of the issues discloses no case comparable to the case at bar. It is true that in certain cases where the entire issue can be decided upon a question of law as in the case of "Laches", the rule has been applied. No case has been found which has authorized the separation of issues in personal injury cases submitted to a jury. Had such been the recognized rule there would have been no necessity for the adoption of Rule 21.

It has been repeatedly held that individual issues in litigation should not be singled out for separate trial.

(*Comp-Resisto Corporation* v. *Glatt*; 18 F.R.D. 148.)

III.

The question plainly involves the right of trial by jury and is necessarily of public interest.

The decision of the Court below is believed to be erroneous and that the Rule providing for separation of liability from damages constitutes a denial of the right of a jury trial as guaranteed by the Federal Constitution. While the specific question involves a rule of the local district court, it is far reaching in its implication. Both plaintiffs and defendants have, almost without exception objected to the rule on the grounds that it deprived them of a right of trial by jury as known at common law. Viewed in any aspect the rule changes the common law concepts of a trial by jury. The rule has been given wide publicity not only in this jurisdiction but in other circuits. The propriety of the rule should be definitely determined by this court.

CONCLUSION

For the reasons herein expressed it is respectfully submitted that a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

In the

UNITED STATES COURT OF APPEALS

for the Seventh Circuit

No. 12953—September Term and Session, 1960

James Hosie, *Plaintiff-Appellant,* v. Chicago and North Western Railway Company, a corporation, *Defendant-Appellee.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

September 28, 1960.

Before Duffy, Knoch and Castle, *Circuit Judges.*

Duffy, *Circuit Judge.* This is a suit for damages for personal injuries which plaintiff suffered when he was struck by one of defendant's trains on or near the intersection of the defendant's tracks with Hale Street and Chicago Avenue, in the Village of Palatine, Cook County, Illinois.

On the day before the trial, the District Court, on its own motion, severed the issue of damages from the place of liability, acting under Rule 21 of the Civil Rules of the District Court for the Northern District of Illinois.[1] Both the plaintiff and defendant objected to the severance.

---

[1] "Separation of Issues in Civil Suits. Pursuant to and in furtherance of Rule 42(b), Federal Rules of Civil Procedure, to curtail undue delay in the administration of justice in personal injury and other civil litigation wherein the issue of liability may be adjudicated as a prerequisite to the determination of any and all other issues, in jury and non-jury cases, a separate trial may be had upon such issue of liability, upon motion of any of the parties or at the Court's direction, in any claim, cross-claim, counterclaim or third-party claim."

At the close of plaintiff's case, defendant moved for a directed verdict which motion was denied. Defendant then rested without offering any evidence. The issue of liability was submitted to the jury, and a verdict finding the defendant "not guilty" of negligence was returned. Judgment in favor of defendant was entered on the verdict.

Hale Street is unpaved south of the tracks and comes to a dead end about one block south of the intersection. North of the tracks, Hale Street is approximately 24 feet in width from curb to curb. South of the track the width of the travelled portion of the street is approximately 40 feet. On the east side of Hale Street and south of the tracks, there is a driveway which leads into the premises of the Hines Lumber Company. Also east of the crossing, a switch track runs in a southeasterly direction from which freight cars can be loaded into and unloaded from the Hines building.

Chicago Avenue is a paved street 30 feet 6 inches wide. A crossing gate is located at the southeast corner of the intersection and also on the northwest corner. A similar gate is located on Chicago Avenue west of the intersection which barricades the sidewalks as well as the street. The posts which support the gates are equipped with flasher lights.

Two main lines of railroad track cross the intersection at an angle of approximately 30 degrees; the northerly tracks are used for southeast bound trains, while the southerly tracks are utilized by northwest bound trains. The Palatine station of the railroad is located approximately 650 feet northwest of the intersection which has been hereinbefore described.

At the time of the occurrence, plaintiff was forty-three years of age, and was employed by Hines Lumber Company as a yard foreman at its Palatine branch. His duties were to see that freight cars brought into the Hines yard were properly loaded and unloaded. The work of unloading the cars was done by stevedores from Chicago. On the

morning in question, stevedores were supposed to arrive at the Palatine station on the train due from Chicago at 7:35 a.m.

Plaintiff checked the cars that were on the Hines siding. In a pretrial statement, he stated that he walked to a point between the tracks and the Hines building, and then proceeded toward the switch stand which is some distance southeast of the crossing. He also said he did not again look to the southeast from which direction the train from Chicago would come. He stated that he came to a stop just west of the switch stand.

On the trial, however, plaintiff stated he was standing at the crossing about one foot distant from the south rail of the most southerly main track. He saw a southeast bound train pass by on the parallel track and waved to the engineer. He claims he neither saw nor heard the train from Chicago before it struck him, although according to his trial testimony, he was then not more than one foot distant from the nearest rail.

Plaintiff asserts prejudicial error in the giving and refusing to give certain instructions. Of course, the instructions must be considered as a whole. *Affleck v. Chicago and North Western Railway Co.*, 7 Cir., 253 F.2d 249, 251-2. By so considering them, we find no prejudicial error.

Plaintiff claims prejudicial error because the Court refused to permit plaintiff to introduce the pretrial deposition of Chester Pauly, or permit plaintiff to call him as an adverse witness. Pauly was a fireman who, at times, acted as engineer, and who, on the day plaintiff was injured, was acting as engineer on the diesel engine which was putting the train which struck plaintiff.

Rule 43(b), Federal Rules of Civil Procedure, provides that a party may call an adverse party or an officer, director or managing agent of a corporation which is an adverse party, and interrogate him by leading questions. Defendant's employee Pauly was not an officer, director or managing agent of the defendant. The rule does not provide that any employee of an adverse party may be called adversely. *Dowell, Inc.* v. *Jowers*, 5 Cir., 182 F.2d 576.

There was no prejudicial error in the refusal of the trial court to permit plaintiff's counsel to read Pauly's deposition to the jury. Rule 26d (3) provides: "5. upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used." No notice was given of plaintiff's intention to read the deposition which had been taken for discovery purposes. At the demand of the trial court, Pauly was personally present in court at the time the request was made that his deposition be read. We are unable to discover any "exceptional circumstances" within the meaning of the rule. As was well said in *Napier* v. *Bossard*, 2 Cir., 102 F.2d 467, 469: "The deposition always has been, and still is, treated as a substitute, a second-best, not to be used when the original is at hand."

Plaintiff claims section 60 of the Illinois Practice Act applies (Ill.Rev.Stat. 1959, ch. 110, §60). However, we are here concerned with a matter of federal procedure and the Illinois Practice Act is not applicable.

Plaintiff asserts error because his counsel was not permitted to comment to the jury upon the failure of defendant to produce and place on the witness stand the train crews of both the north- and south-bound trains which passed the intersection shortly before and at the time plaintiff was injured. We do not think this was error in a situation where defendant introduced no evidence at all, but relied on the proposition that plaintiff had failed to meet the burden of proof upon him to support the allegations of his complaint.

There remains for consideration the very important question of whether plaintiff was deprived of a jury trial in violation of the Seventh Amendment of the Constitution of the United States when the trial court *sua sponte* and over the objection of plaintiff, ordered the case to proceed to trial solely on the issue of liability.

It is true, defendant's counsel also objected, but did so on the basis that the issues in the instant case might be

tried before two juries if the issues of liability and damages were tried separately. As it turned out, the issue of damages was not reached because of the jury's finding of no liability.

Plaintiff argues that the record clearly indicates the trial judge intended to submit the issue of damages to a second jury if that issue were reached. Granting this to be true, we do not face that question on this appeal. Whether a party is deprived of a jury trial as contemplated by the Seventh Amendment when some of the issues are submitted to one jury and other issues to a second jury, is a more difficult question to resolve. However, we emphasize that we do not pass on that question on this appeal.

Plaintiff argues that the application of local Rule 21 to the trial below, abridged and modified his right to a jury trial as guaranteed by the Seventh Amendment. He charges such procedure changed the ancient and long-established manner of conducting trials of civil cases at common law.

The Seventh Amendment to the Constitution of the United States reads:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

Title 28 U.S.C.A. §2072 provides that the Supreme Court shall have power to prescribe rules for the practice and procedure in the district courts and provides: "Such rules * * * shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

Plaintiff cites and relies on *Patton* v. *United States*, 281 U.S. 276; *Miller* v. *American Bonding Company*, 257 U.S. 304, and *Hodges* v. *Easton*, 106 U.S. 408. None of these cases deal with the question now before us. However,

plaintiff cites some general statements contained in these opinions which he considers to be persuasive.

In *Hodges*, the Court said at page 412: "* * * It has often been said by this court that the trial by jury is a fundamental guaranty of the rights and liberties of the people. Consequently, every reasonable presumption should be indulged against its waiver. * * *" In that case, the Supreme Court refused to order on remand that the new trial be confined to certain issues, but the court specifically declined to rule on the question of whether such requested procedure was sound.

In *Patton*, the Court stated that "trial by jury" meant a trial as understood and applied at common law, and that the jury should consist of twelve men, neither more nor less, and that the verdict should be unanimous. (281 U.S. 276, 288.)

The decision in *Miller* v. *American Bonding Company* was not based upon the Seventh Amendment. The Court stated (257 U.S. at page 308) that in actions of law the general practice is to try all issues in the case at one time, and it is only in exceptional cases where there are special and persuasive reasons for departing from the practice, that distinct causes of action asserted in the same case may be made the subject of special trials. The court held that whether this may be done in any particular instance, rests largely in the court's discretion.

The Supreme Court promulgated Rule 42(b), Federal Rules of Civil Procedure. We must assume the Court had in mind the statutory admonition that "Such rules * * * shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution." Rule 42 (b) reads: "The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues."

We hold that in the trial of the instant case, the essential character of a trial by jury was preserved. In our view, the Seventh Amendment does not require the retention of all the old forms of procedure; nor does it prohibit the introduction of new methods for ascertaining what facts are in issue. *See Gasoline Products Co. Inc.* v. *Champlin Refining Co.*, 283 U.S. 494, 497-8.

Justice Brandeis pointed out in *In re Peterson*, 253 U.S. 300, 309-10: "* * * New devices may be used to adapt the ancient institution (jury trial) to present needs and to make it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right. The limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that ultimate determination of issues of fact by the jury be not interfered with."

In *Galloway* v. *United States*, 319 U.S. 372, the Court was discussing the granting of a directed verdict. The Court said, at pages 390-392: "The (Seventh) Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing. Nor were 'the rules of the common law' then prevalent, including those relating to the procedure by which the judge regulated the jury's role on questions of fact, crystallized in a fixed and immutable system. On the contrary, they were constantly changing and developing during the late eighteenth and early nineteenth centuries. In 1791 this process already had resulted in widely divergent common-law rules on procedural matters among the states, and between them and England. * * *"

Many of the federal district courts of this country are laboring under the heavy burden of crowded trial dockets. The Northern District of Illinois is no exception. The judges of that court should be commended for their search for methods and means to expedite the disposition of cases upon their calendars. There is no doubt that in numerous

cases, the severing of the issue of liability from the issue of damages will result in the shortening of the time of trial. The instant case is a good example. Without such severance, hours or even a day or two might have been consumed on the issue of damages.

It is important that the rule permitting the severance of issues be carefully administered. It is almost certain that cases will come before the court where a question as to the injuries has an important bearing on the question of liability. In a recent case before this Court, where there had been no separation of issues, it was important to ascertain whether a flame causing an explosion resulted from a spark of static electricity near the floor, or whether it was caused by a flame from a pilot light near the top of a gas stove. The location of the burns on the face and upper part of plaintiff's body were a proper and important consideration for the jury.

As we find no error, the judgment of the District Court is

AFFIRMED.

APPENDIX "B"

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

Wednesday, September 28, 1960

Hon. F. Ryan Duffy, Circuit Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge

JAMES HOSIE,
Plaintiff-Appellant,
v.
No. 12953
CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

FILE COPY

IN THE

Supreme Court of the United States

October Term, 1950.

No. 600

JAMES HOSIER,

Petitioner,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION.

Chicago and North Western Railway Company, under Rule 24 of this Court, submits this brief in opposition to the petition for certiorari.

OPINION BELOW.

The opinion of the Court of Appeals is reported at 282 F. (2d) 639.

STATEMENT.

Petitioner was struck by a train when he was standing or walking too close to a railroad track; and he brought this suit in the United States District Court for the Northern District of Illinois to recover damages for his personal

injuries. On the day before the trial, the trial judge advised the parties that, in accordance with Rule 21 of the Civil Rules of the District Court,[1] the issue of liability would be tried separately. Plaintiff's counsel at that time objected in general terms to this procedure. He made no objection on the ground that the nature of the case was such that the issue of liability could not be tried separately, or that he would necessarily be precluded by this ruling from introducing evidence of injuries relevant to the issue of liability. At no time during the course of the trial on the separate issue of liability did petitioner ever offer any evidence of injuries.

The issue of liability was submitted to a jury, which returned a verdict of no liability. The judgment entered on this verdict was affirmed by the Court of Appeals. Of the several grounds of error urged upon that court, the only one pursued in the petition relates to the procedure followed in trying the issue of liability separately.

QUESTION PRESENTED.

Was petitioner subjected to prejudicial error, calling for correction by this Court, by reason of the action of the Court of Appeals in affirming a judgment entered on a verdict of a jury after a separate trial of the issue of liability, in the course of which trial petitioner made no proffer of evidence of injury or damage as bearing upon the issue of liability?

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1. "Rule 21. *Separation of Issues in Civil Suits.* Pursuant to and in furtherance of Rule 42(b), Federal Rules of Civil Procedure, to curtail undue delay in the administration of justice in personal injury and other civil litigation wherein the issue of liability may be adjudicated as a pre-requisite to the determination of any or all other issues, in jury and non-jury cases, a separate trial may be had upon such issue of liability, upon motion of any of the parties or at the Court's direction, in any claim, cross-claim, counter-claim or third-party claim."

REASONS FOR DENYING THE WRIT.

There are no special and important reasons, within the meaning of Rule 19, why this Court should grant the petition. The petition does not show any important question of federal law which has not, but which should be, settled by this Court; any conflict between the Courts of Appeals; or any decision of a federal question in conflict with applicable decisions of this Court. Neither has the Court of Appeals sanctioned any departure by the District Court from the accepted and usual course of judicial proceedings warranting an exercise of this Court's supervisory powers.

The questions formulated by the petition appear to assert these propositions: First, any rule of procedure which contemplates the exercise of discretion by a trial court to try the issue of liability separately in a personal injury suit is unconstitutional on its face as a deprivation of the right of jury trial guaranteed by the Seventh Amendment to the Federal Constitution; and, second, constitutional considerations apart, the separate trial of the issue of liability in this case had the effect of denying to petitioner a fair trial of that issue, in such degree as to call for reversal by this Court in the exercise of its supervisory jurisdiction.

As to the first, the claim is that Rule 42(b) of the Federal Rules of Civil Procedure is unconstitutional on its face, at least in any personal injury case where the issue of liability is tried separately from the issue of damages. This Court, under whose authority Rule 42(b) was promulgated, has never so decided nor even intimated such a result. There is no conflict among the Courts of Appeals; and, indeed, the only other Court of Appeals decision on the point is in accord with the decision below. *Nettles* v. *General Accident Fire & Assurance Corp.*, 234 F. 2d 243 (5th Cir., 1956).

The second contention can only be that, in the circumstances of this particular case, there was an abuse of discretion in the granting of a separate trial, so serious in its prejudicial effects upon petitioner that the supervisory jurisdiction of the appellate courts should be brought to bear. But the record in this case shows that petitioner made only a general objection at the time the District Court announced its intention to separate the issue of liability for trial; that neither then nor later did he press upon the trial court any specific reasons why the nature of the injury and of the damages in this case had any relevance to the issue of the existence or non-existence of liability; and that at no time during the actual course of the trial did he proffer any evidence of injury or damage as relevant to the issue of liability. The trial judge had never indicated that he would under no circumstances receive any evidence of injury if the same could reasonably be shown to have some relationship to the question of liability; and it must be assumed, therefore, that the failure of petitioner to offer any such evidence was due to the complete absence of any such relationship. On these facts, the claim of prejudicial error becomes virtually as insubstantial as the alleged constitutional issue.

ARGUMENT.

In his discussion of Rule 42(b), Professor Moore makes the following comment:

> "A separate trial may, of course, be granted as to a particular issue, even though it does not amount to a 'claim' or a 'defense'. Separate trial may properly be ordered on the issue of the defendant's liability to respond in damages, particularly where plaintiff's proof of damages would involve the testimony of a large number of persons. This procedure has been privately recommended by a number of members of the judiciary as a means of expediting trials and of saving time and expense. We have found no reason why this procedure, which is authorized by Rule 42(b) should not be more extensively employed * * *" 5 Moore's Federal Practice, ¶42.03, p. 1217.

As the Court of Appeals recognizes in its opinion below, Rule 21 of the Civil Rules of the United States District Court for the Northern District of Illinois rests upon the authority of Rule 42(b) and is simply a special formulation of it in personal injury and other civil cases as a part of an effort to attack the problem of calendar congestion. As in the case of Rule 42(b), Rule 21 is not mandatory, but its utilization rests in the sound discretion of the trial judge. To suggest, as the petition appears to do, that a rule of procedure contemplating a discretionary decision by a trial judge to separate the issue of liability for trial from the issue of injury or damages violates the Seventh Amendment without more, amounts to a frivolity. There is no absolute right in a plaintiff in a personal injury case to have all of his evidence—that pertaining to damage as well as to liability—go before the jury at one time. This Court has never said anything that would provide

any foundation for such a position and, indeed, its own promulgation of Rule 42(b) looks squarely in the other direction.

The only issue tendered by the petition of any conceivable substance, therefore, is that of whether the trial court in this case abused its discretion by invoking Rule 21 and the underlying Rule 42(b), under circumstances which resulted in prejudice so harmful to petitioner that the supervisory powers of the appellate courts should be exercised. The Court of Appeals expressly found nothing in the record indicating such prejudice. It noted that petitioner had not pressed upon the trial court at the time of the original determination to separate the issues any reasons why the facts with respect to injury and damage in this instance were relevant in the jury's determination of liability. Although he was under no admonition from the court not to do so, petitioner did not, during the course of the trial, proffer any evidence of injury or damage whatsoever. Petitioner, accordingly, must be taken as saying to this Court that any separation of the issue of liability from that of damage in a personal injury case constitutes reversible error and that this Court should, accordingly, take this case and so hold. Two Courts of Appeals have now held that there is no such error; and the issue is neither so doubtful nor so lacking in authoritative support in the decided cases to warrant its scrutiny by this Court.

This Court has recognized that the Seventh Amendment guarantees the substance of jury trial as it was known at common law, but that it does not extend to the freezing of rules respecting the admissibility of evidence, the trial of issues, or other procedural matters, if for no other reason than that there was no uniformity in these areas at the time the Seventh Amendment was adopted. *Capital Traction Co.* v. *Hof*, 174 U. S. 1 (1899); and see *Galloway* v. *United States*, 319 U. S. 372 (1942) at pp. 390-92. Nothing

that was done in the trial of this case falls outside either the letter or the spirit of Justice Brandeis' statement in *Ex Parte Peterson*, 253 U. S. 300 (1920) at pp. 309-10:

> "New devices may be used to adapt the ancient institution (jury trial) to present needs and to make it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right. The limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that ultimate determination of issues of fact by the jury be not interfered with."

CONCLUSION

For the reasons stated above, the petition should be denied.

Respectfully submitted,

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